

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

REMOH GARRY,

Plaintiff

Case No. 2:23-cv-01655-GMN-EJY

SCREENING ORDER

v.

BEAN, et al.,

Defendants

Plaintiff Remoh Garry ("Plaintiff"), who is incarcerated in the custody of the Nevada Department of Corrections ("NDOC"), has submitted a civil rights complaint ("Complaint") under 42 U.S.C. § 1983, an application to proceed *in forma pauperis*, a motion seeking to exceed the page limit, a motion for appointment of counsel, and a motion for a preliminary injunction. (ECF Nos. 1, 1-1, 1-4, 3, 4.) The matter of the filing fee will be temporarily deferred. The Court now screens Plaintiff's Complaint under 28 U.S.C. § 1915A and disposes of the motions.

**I. SCREENING STANDARD**

Federal courts must conduct a preliminary screening in any case in which an incarcerated person seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. See *id.* §§ 1915A(b)(1), (2). *Pro se* pleadings, however, must be liberally construed. See *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States; and (2) that the alleged violation was committed by a person acting under color of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

In addition to the screening requirements under § 1915A, under the Prison

1 Litigation Reform Act (“PLRA”), a federal court must dismiss an incarcerated person’s  
2 claim if “the allegation of poverty is untrue” or if the action “is frivolous or malicious, fails  
3 to state a claim on which relief may be granted, or seeks monetary relief against a  
4 defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a  
5 complaint for failure to state a claim upon which relief can be granted is provided for in  
6 Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under  
7 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a  
8 court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend  
9 the complaint with directions as to curing its deficiencies, unless it is clear from the face  
10 of the complaint that the deficiencies could not be cured by amendment. *See Cato v.*  
11 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

12 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See*  
13 *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to  
14 state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in  
15 support of the claim that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d  
16 756, 759 (9th Cir. 1999). In making this determination, the Court takes as true all  
17 allegations of material fact stated in the complaint, and the Court construes them in the  
18 light most favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th  
19 Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than  
20 formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While  
21 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff  
22 must provide more than mere labels and conclusions. *See Bell Atl. Corp. v. Twombly*,  
23 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is  
24 insufficient. *See id.*

25 Additionally, a reviewing court should “begin by identifying pleadings [allegations]  
26 that, because they are no more than mere conclusions, are not entitled to the assumption  
27 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can provide  
28 the framework of a complaint, they must be supported with factual allegations.” *Id.* “When

1 there are well-pleaded factual allegations, a court should assume their veracity and then  
 2 determine whether they plausibly give rise to an entitlement to relief.” *Id.* “Determining  
 3 whether a complaint states a plausible claim for relief . . . [is] a context-specific task that  
 4 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*

5 Finally, all or part of a complaint filed by an incarcerated person may be dismissed  
 6 *sua sponte* if that person’s claims lack an arguable basis either in law or in fact. This  
 7 includes claims based on legal conclusions that are untenable (*e.g.*, claims against  
 8 defendants who are immune from suit or claims of infringement of a legal interest which  
 9 clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.*,  
 10 fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327–28 (1989);  
 11 *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

## 12 **II. SCREENING OF COMPLAINT<sup>1</sup>**

13 In his Complaint, Plaintiff sues multiple Defendants for events that took place while  
 14 he was incarcerated at High Desert State Prison (“HDSP”). (ECF No. 1-1 at 1.) Plaintiff  
 15 sues Defendants Interim Warden Bean, Warden Brian Williams, Henry Ruckers,  
 16 Associate Warden James Scally, and Doe Director of Nursing. (*Id.* at 1–3.) Plaintiff brings  
 17 three claims and seeks monetary and injunctive relief. (*Id.* at 4–13.)

18 Plaintiff alleges the following. On June 22, 2023, Plaintiff called for a “man down”  
 19 because he had chest pain and thought he was having a heart attack. (*Id.* at 8.) Prison  
 20 officials moved Plaintiff to the medical wing of the prison. (*Id.*) At this point, Plaintiff stated  
 21 his symptoms were excruciating chest pain, shooting pain down his left arm, shortness of  
 22 breath, and profuse sweating. (*Id.*) The medical team only conducted an EKG. (*Id.*) The  
 23 nurse administering the EKG told Plaintiff that his heart was enlarged. (*Id.*) This condition  
 24 would persist over time, and it occurred because Plaintiff did not receive any medical  
 25 treatment for his heart. (*Id.* at 7.) The attending physician said that Plaintiff needed to  
 26 see a cardiologist, and she ordered an ultrasound and blood work for Plaintiff. (*Id.*)  
 27 Plaintiff’s condition should have been treated in 2021 when a doctor first discovered it.

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28 <sup>1</sup> Inmate Eric Garcia helped Plaintiff prepare the Complaint. (ECF No. 1-1 at 13.)

1 (*Id.*)

2 According to Plaintiff the medical treatment at HDSP is subpar because the nurses  
3 are not properly trained. (*Id.* at 4–6.) For example, despite Plaintiff’s family having a  
4 history of strokes and heart attacks, the nurses only took Plaintiff’s vitals when he arrived  
5 at HDSP. (*Id.* at 5.) They did not administer an EKG or take Plaintiff’s blood. (*Id.*) In  
6 addition, there is a pattern of practice at HDSP where the nurses fail to take patient  
7 reports. (*Id.* at 6.) Plaintiff’s medical condition occurred because the Defendants failed to  
8 follow the proper procedures. (*Id.* at 9.) Finally, Plaintiff claims when the Defendants  
9 blatantly ignored him, they discriminated against him. (*Id.* at 10.)

10 Based on these allegations, Plaintiff raises two claims of Eighth Amendment  
11 deliberate indifference to a serious medical need claim. He also raises a “discrimination”  
12 claim, but the Court construes it as an Eighth Amendment deliberate indifference to a  
13 serious medical need claim because it deals with the ignoring of his medical condition.  
14 The Court will treat the Eighth Amendment claims as a single claim because they concern  
15 the same allegations.

16 The Eighth Amendment prohibits the imposition of cruel and unusual punishment  
17 and “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity,  
18 and decency.’” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A prison official violates the  
19 Eighth Amendment when he acts with “deliberate indifference” to the serious medical  
20 needs of an inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). “To establish an  
21 Eighth Amendment violation, a plaintiff must satisfy both an objective standard—that the  
22 deprivation was serious enough to constitute cruel and unusual punishment—and a  
23 subjective standard—deliberate indifference.” *Snow v. McDaniel*, 681 F.3d 978, 985 (9th  
24 Cir. 2012), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076, 1082–83 (9th  
25 Cir. 2014).

26 To establish the first prong, “the plaintiff must show a serious medical need by  
27 demonstrating that failure to treat a prisoner’s condition could result in further significant  
28 injury or the unnecessary and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091,

1 1096 (9th Cir. 2006) (internal quotations omitted). To satisfy the deliberate indifference  
2 prong, a plaintiff must show “(a) a purposeful act or failure to respond to a prisoner’s pain  
3 or possible medical need and (b) harm caused by the indifference.” *Id.* “Indifference may  
4 appear when prison officials deny, delay or intentionally interfere with medical treatment,  
5 or it may be shown by the way in which prison physicians provide medical care.” *Id.*  
6 (internal quotations omitted). When a prisoner alleges that delay of medical treatment  
7 evinces deliberate indifference, the prisoner must show that the delay led to further injury.  
8 See *Shapley v. Nev. Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985)  
9 (holding that “mere delay of surgery, without more, is insufficient to state a claim of  
10 deliberate medical indifference”).

11 A defendant is liable under 42 U.S.C. § 1983 “only upon a showing of personal  
12 participation by the defendant.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). “A  
13 supervisor is only liable for constitutional violations of his subordinates if the supervisor  
14 participated in or directed the violations, or knew of the violations and failed to act to  
15 prevent them. There is no respondeat superior liability under [§]1983.” *Id.*; see also *Iqbal*,  
16 556 U.S. at 676 (holding that “[b]ecause vicarious liability is inapplicable to *Bivens* and §  
17 1983 suits, a plaintiff must plead that each Government-official defendant, through the  
18 official’s own individual actions, has violated the Constitution”).

19 To state a claim for supervisory liability for failure to train, “the plaintiff must show  
20 that the official was ‘deliberately indifferent to the need to train subordinates, and the lack  
21 of training actually caused the constitutional harm or deprivation of rights.’” *Hyde v. City*  
22 *of Willcox*, 23 F.4th 863, 874 (9th Cir. 2022) (quoting *Flores v. Cnty. of L.A.*, 758 F.3d  
23 1154, 1159 (9th Cir. 2014)). To satisfy this standard, the plaintiff must “allege facts to  
24 show that the official ‘disregarded the known or obvious consequence’ that a particular  
25 omission in their training program would cause [prison] employees to violate [prisoners’]  
26 constitutional rights.” See *id.* (internal brackets and ellipses omitted) (quoting *Connick v.*  
27 *Thompson*, 563 U.S. 51, 61 (2011)).

28 The Court finds that Plaintiff fails to state a colorable Eighth Amendment deliberate

indifference to a serious medical need claim on screening. First, Plaintiff does not allege that any of the Defendants explicitly knew about his heart condition and the subpar medical care at HDSP. He only makes vague allegations that they ignored him. Second, the allegations that the nursing staff were improperly trained does not support a claim against the Defendants—who are all high-ranking officials at HDSP—because Plaintiff fails to show that they were “deliberately indifferent to the need to train [the nurses], and the lack of training caused the constitutional harm or deprivations of rights.” *Flores*, 758 F.3d at 1159. Therefore, the Court dismisses this claim without prejudice. And because this is the only claim in the Complaint, the Court dismisses the entire Complaint without prejudice with leave to amend.

If Plaintiff chooses to amend this claim, he must state how the Defendants, by name, were deliberately indifferent to his health condition.

### **III. MOTIONS ON DOCKET**

#### **A. Motion to Exceed Page Limit (ECF No. 3)**

The Court denies as moot Plaintiff’s motion to exceed the 30-page limit for civil rights filings by *pro se* inmates (ECF No. 3) because the entire Complaint has been dismissed without prejudice with leave to amend.

#### **B. Motion for Appointment of Counsel (ECF No. 1-4)**

Plaintiff files a motion for the appointment of counsel. (ECF No. 1-4.) In his motion, Plaintiff requests counsel because he states that the issues in the case are complex. (*Id.* at 1–2.)

A litigant does not have a constitutional right to appointed counsel in 42 U.S.C. § 1983 civil rights claims. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). Pursuant to 28 U.S.C. § 1915(e)(1), “[t]he court may request an attorney to represent any person unable to afford counsel.” However, the court will appoint counsel for indigent civil litigants only in “exceptional circumstances.” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (§ 1983 action). “When determining whether ‘exceptional circumstances’ exist, a court must consider ‘the likelihood of success on the merits as well as the ability of the

petitioner to articulate his claims *pro se* in light of the complexity of the legal issues involved.” *Id.* “Neither of these considerations is dispositive and instead must be viewed together.” *Id.*

In the instant case, Plaintiff fails to establish that he is likely to succeed on the merits of his case because the Court dismissed the entire Complaint with leave to amend. In addition, the Court does not find that the issues in this case, as pled, are overly complex. Therefore, the Court denies the motion for the appointment of counsel without prejudice.

### **C. Motion for Preliminary Injunction (ECF No. 4)**

Plaintiff moves for a preliminary injunction concerning his health condition. (ECF No. 4 at 1–3.) The Court denies this motion without prejudice because the entire Complaint is dismissed without prejudice with leave to amend.

The Court advises Plaintiff that such motions are “extraordinary remed[ies] never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Am. Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter*, 555 U.S. at 20). Furthermore, under the PLRA, preliminary injunctive relief must be “narrowly drawn,” must “extend no further than necessary to correct the harm,” and must be “the least intrusive means necessary to correct the harm.” 18 U.S.C. § 3626(a)(2). Because there are no pending claims in this action, Plaintiff cannot show that he is likely to succeed on the merits of his case. As such, the Court denies the motion without prejudice.

### **IV. LEAVE TO AMEND**

Plaintiff is granted leave to file an amended complaint to cure the deficiencies of the Complaint. If Plaintiff chooses to file an amended complaint, he is advised that an amended complaint supersedes (replaces) the original complaint and, thus, the amended



1 complaint must be complete in itself. See *Hal Roach Studios, Inc. v. Richard Feiner &*  
2 *Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (holding that “[t]he fact that a party was  
3 named in the original complaint is irrelevant; an amended pleading supersedes the  
4 original”); see also *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (holding  
5 that for claims dismissed with prejudice, a plaintiff is not required to reallege such claims  
6 in a subsequent amended complaint to preserve them for appeal). Plaintiff’s amended  
7 complaint must contain all claims, defendants, and factual allegations that he wishes to  
8 pursue in this lawsuit. Moreover, Plaintiff should file the amended complaint on this  
9 Court’s approved prisoner civil rights form, and it must be entitled “First Amended  
10 Complaint.” If Plaintiff chooses to file an amended complaint curing the deficiencies of his  
11 Complaint, as outlined in this order, he will file the amended complaint within **30 days**  
12 from the entry date of this order. If Plaintiff fails to file an amended complaint by the  
13 deadline, the Court will dismiss this action, without prejudice, for failure to state a claim.

#### 14 **V. CONCLUSION**

15 It is therefore ordered that the application to proceed *in forma pauperis* (ECF No.  
16 1) is deferred.

17 It is further ordered that the Clerk of the Court file the Complaint (ECF No. 1-1) and  
18 send Plaintiff a courtesy copy.

19 It is further ordered that the motion for appointment of counsel (ECF No. 1-4) is  
20 denied without prejudice.

21 It is further ordered that the motion to exceed the page limit (ECF No. 3) is denied  
22 as moot.

23 It is further ordered that the motion for a preliminary injunction (ECF No. 4) is  
24 denied without prejudice.

25 It is further ordered that the entire Complaint (ECF No. 1-1) is dismissed without  
26 prejudice with leave to amend.

27 It is further ordered that, if Plaintiff chooses to file an amended complaint curing  
28 the deficiencies of his Complaint, as outlined in this order, he will file the amended



1 complaint within **30 days** from the entry date of this order.

2 It is further ordered that the Clerk of the Court will send Plaintiff the approved form  
3 for filing a § 1983 complaint and instructions for the same. If Plaintiff chooses to file an  
4 amended complaint, he should use the approved form and mark "First Amended  
5 Complaint" in the caption.

6 It is further ordered that, if Plaintiff fails to file an amended complaint curing the  
7 deficiencies outlined in this order, the Court will dismiss this action without prejudice for  
8 failure to state a claim.

9 DATED THIS 29 day of April 2024.

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13 Gloria M. Navarro, Judge  
14 United States District Court  
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